

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KRISTI L. SOMA,

Plaintiff,

CASE NO. C14-0870-RAJ-MAT

V.

## REPORT AND RECOMMENDATION

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

13 Plaintiff Kristi Soma proceeds with counsel in her appeal of a final decision of the  
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner  
15 denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security  
16 Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the  
17 ALJ's decision, the administrative record (AR), and all memoranda, the Court recommends this  
18 matter be REMANDED for further administrative proceedings.

## **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1961.<sup>1</sup> She completed high school, attended some college,  
21 and previously worked as a game auditor. (AR 41.)

<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 Plaintiff filed her DIB application in March 2011 and protectively filed for SSI in April 2012,  
2 alleging disability beginning March 15, 2008. (AR 120-21, 130-33.) She remained insured for  
3 DIB through June 30, 2010 and, therefore, was required to establish disability on or prior to that  
4 “date last insured” (DLI) in order to qualify for DIB. *See* 20 C.F.R. §§ 404.131, 404.321. Her  
5 applications were denied initially and on reconsideration, and she timely requested a hearing.

6 On September 17, 2012, ALJ Verrell Dethloff held a hearing, taking testimony from  
7 plaintiff. (AR 36-49.) Plaintiff appeared pro se at the hearing. On December 19, 2012, the ALJ  
8 issued a decision finding plaintiff not disabled. (AR 17-31.)

9 Plaintiff timely appealed. The Appeals Council denied review on May 15, 2014 (AR 1-  
10 4), making the ALJ’s decision the final decision of the Commissioner. Plaintiff appealed to this  
11 Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining  
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
17 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not  
18 engaged in substantial gainful activity since the March 15, 2008 alleged onset date.

19 At step two, it must be determined whether a claimant suffers from a severe impairment.  
20 The ALJ found no severe impairment. Addressing severity in relation to plaintiff’s DIB claim,  
21 the ALJ found insufficient evidence to evaluate the severity of plaintiff’s mental impairment  
22 given the “very sparse record” for the period through plaintiff’s DLI. (AR 22.) As to plaintiff’s  
23 SSI claim, the ALJ found the record consistent with a finding of no severe mental impairment

1 from the protective filing date of April 13, 2012. (*Id.*) He added that, while there were opinions  
2 indicating plaintiff had significant functional mental limitations, those opinions were based on  
3 evaluations done well before the relevant time period and, therefore, given no weight. (AR 23.)  
4 However, the ALJ also rendered an alternative finding, deeming plaintiff's major depressive  
5 disorder severe at step two.

6 Step three asks whether a claimant's impairments meet or equal a listed impairment. The  
7 ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment. If a  
8 claimant's impairments do not meet or equal a listing, the Commissioner must assess residual  
9 functional capacity (RFC) and determine at step four whether the claimant has demonstrated an  
10 inability to perform past relevant work. The ALJ found plaintiff had the RFC to understand,  
11 remember, and perform simple, repetitive work, as well as some complex tasks, up to four-to-  
12 five steps. With that RFC, the ALJ concluded plaintiff was able to perform past relevant work as  
13 a game auditor.

14 If a claimant demonstrates an inability to perform past relevant work or has no past  
15 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant  
16 retains the capacity to make an adjustment to work that exists in significant levels in the national  
17 economy. The ALJ here further concluded that, assuming plaintiff could not perform her past  
18 relevant work, she would be found not disabled within the framework of Medical-Vocational  
19 Guideline Number 204. The ALJ, therefore, concluded plaintiff was not disabled at any time  
20 from the alleged onset date through the date of the decision.

21 This Court's review of the final decision is limited to whether the decision is in  
22 accordance with the law and the findings supported by substantial evidence in the record as a  
23 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more

1 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
2 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,  
3 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the  
4 final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th  
5 Cir. 2002).

6 Plaintiff argues the ALJ erred in rejecting medical opinions and finding no severe  
7 impairment prior to the DLI, and erred in rejecting both her testimony and a lay witness  
8 statement. She also argues error in the RFC assessment and step four and five conclusions. She  
9 requests remand for further administrative proceedings. The Commissioner argues the ALJ's  
10 decision has the support of substantial evidence and should be affirmed.

11 Medical Opinions

12 In general, more weight should be given to the opinion of a treating physician than to a  
13 non-treating physician, and more weight to the opinion of an examining physician than to a non-  
14 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not  
15 contradicted by another physician, a treating or examining physician's opinion may be rejected  
16 only for ““clear and convincing”” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396  
17 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be  
18 rejected without ““specific and legitimate reasons’ supported by substantial evidence in the  
19 record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
20 1983)).

21 Less weight may be assigned to the opinions of “other sources,” such as nurse  
22 practitioners. *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir. 1996). However, the ALJ's decision  
23 should reflect consideration of such opinions, Social Security Ruling (SSR) 06-3p, and the ALJ

1 may discount the evidence by providing reasons germane to each source. *Molina v. Astrue*, 674  
2 F.3d 1104, 1111 (9th Cir. 2012) (cited sources omitted).

3 A. Dr. Nancy Connolly

4 Treating physician Dr. Nancy Connolly drafted a letter on June 30, 2010, stating plaintiff  
5 was “unable to work at this time because of severe depression and emotional stress[,]” and  
6 needed “counseling, medication and frequent follow-up in order to resolve these problem[s].”  
7 (AR 246.) Non-examining physicians Drs. Jan Lewis and Thomas Clifford opined there was  
8 insufficient evidence to evaluate plaintiff’s impairments prior to the DLI. (AR 56, 65.) The ALJ  
9 was, therefore, required to provide specific and legitimate reasons for rejecting the opinion of Dr.  
10 Connolly.

11 The ALJ gave no weight to the opinions of Dr. Connolly “as contemporaneous treatment  
12 records do not substantiate such severity.” (AR 28.) He stated: “On that occasion, there was  
13 noted depressed affect with crying during the evaluation, but there was otherwise no significant  
14 clinical observation.” (*Id.* (citing AR 261-64).) The ALJ concluded Dr. Connolly “likely relied  
15 heavily, if not entirely,” on plaintiff’s self-report, of which the ALJ found credibility concerns.  
16 (*Id.*)

17 Plaintiff denies the accuracy of the ALJ’s statement as to contemporaneous treatment  
18 notes, pointing to notes dated from June through August 2010 and showing plaintiff was having  
19 difficulty relating to her daughter, issues with her insurance, difficulty getting a ride to see the  
20 doctor, had her phone disconnected due to her inability to pay the bill, and called the clinic  
21 reporting her fear she was having a “nervous breakdown.” (AR 277-84.) However, in addition  
22 to the fact that these notes appear to reflect plaintiff’s reporting of a variety of situational  
23 stressors, the ALJ reasonably interpreted the record as failing to substantiate Dr. Connolly’s

1 opinion as to the severity of plaintiff's depression. (AR 256, 261-65, 270-71, 277-84, 316-21.)  
2 The ALJ's reasonable interpretation should not be disturbed. *Carmickle v. Comm'r of SSA*, 533  
3 F.3d 1155, 1164 (9th Cir. 2008) (ALJ is responsible for resolving conflicts in the medical  
4 record), and *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (when evidence reasonably  
5 supports either confirming or reversing the ALJ's decision, court may not substitute its judgment  
6 for that of the ALJ). *See also Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir.  
7 1999) ("Where the evidence is susceptible to more than one rational interpretation, it is the ALJ's  
8 conclusion that must be upheld.").

9 Plaintiff also argues the ALJ erred in speculating Dr. Connolly relied on plaintiff's self-  
10 report. She contends the ALJ should have further developed the record by contacting Dr.  
11 Connolly for clarification, noting Dr. Connolly rendered her opinion on plaintiff's exact DLI and  
12 the fact that plaintiff appeared pro se at hearing. She also points to the ALJ's failure to address  
13 an evaluation completed by Dr. Brenda Havellana only nine days after the letter from Dr.  
14 Connolly. (See AR 238, 246.) Plaintiff maintains the relevance of the ALJ's errors to the step  
15 two conclusion, noting his reference to the "very sparse record for the Title II period[.]" (AR  
16 22.) She contends the contradictory opinions of Drs. Lewis and Clifford were not alone  
17 sufficient evidence to reject the opinions of treating physician Dr. Connolly and examining  
18 physician Dr. Havellana. *See Lester*, 81 F.3d at 831 ("The opinion of a nonexamining physician  
19 cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either  
20 an examining physician or a treating physician.")

21 The ALJ's decision reflects his reasonable interpretation of the record as containing a  
22 fairly minimal amount of evidence supportive of restrictions exceeding that assessed in the RFC,  
23 while reflecting "periodic subjective complaints of increased symptoms[,]" likely resulting, at

1 least in part, to noncompliance with treatment and situational factors, such as plaintiff's finances  
2 and her daughter, who had significant mental health issues. (See AR 21-22, 25-26.) Considering  
3 the evidence as a whole, the specific evidence from Dr. Connolly, and the evidence dated close  
4 in time to Dr. Connolly's letter and plaintiff's DLI, the ALJ can be said to have drawn a logical  
5 inference in concluding Dr. Connolly relied heavily on plaintiff's self-report. *See Sample v.*  
6 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) ("In reaching his findings, the law judge is entitled  
7 to draw inferences logically flowing from the evidence.") (cited sources omitted). Nor is it clear  
8 the ALJ should have contacted Dr. Connolly for clarification as to his opinion. *See, e.g., Bayliss*  
9 *v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005) (finding no duty to recontact where doctor's  
10 opinion was not supported by clinical evidence and was based on claimant's subjective  
11 complaints and the ALJ found the record adequate to make a determination as to disability).  
12 Therefore, considered in isolation, plaintiff fails to demonstrate error in relation to Dr. Connolly.  
13 However, as discussed below, the ALJ did err in his consideration of the evidence from Dr.  
14 Havellana. Considering the ALJ's failure to address the July 9, 2010 evaluation from Dr.  
15 Havellana and its close proximity in time to the opinion rendered by Dr. Connolly, the ALJ  
16 should also reconsider Dr. Connolly's opinion on remand, including any potential impact on his  
17 consideration of plaintiff's claim for DIB.

18 B. Dr. Brenda Havellana

19 Dr. Brenda Havellana examined and completed psychological evaluations of plaintiff on  
20 July 9, 2010 and December 3, 2010. (AR 223-40.) The results of the evaluations were similar,  
21 including observation of plaintiff's marked depressed mood and feelings of hopelessness and the  
22 opinion she was markedly limited in a number of respects, while also reflecting a mini-mental  
23 status examination within normal limits and assessing a Global Assessment of Functioning

1 (GAF) score indicating moderate symptoms or moderate difficulty in social, occupational, or  
2 school functioning.<sup>2</sup> (*Id.*) In the initial evaluation, Dr. Havellana deemed plaintiff chronically  
3 mentally ill and estimated she would be impaired as assessed for seven months maximum and  
4 three months minimum. (AR 237-38.) In the second evaluation, Dr. Havellana estimated the  
5 assessed limitations would persist for a maximum of nine months and a minimum of three  
6 months. (AR 226.)

7 The ALJ only addressed Dr. Havellana's second evaluation. He gave little weight, apart  
8 from the opinion as to plaintiff's ability to perform simple instructions, to the limitations  
9 assessed or GAF score "as such degrees of severity are inconsistent with the psychologist's own  
10 clinical observations." (AR 27-28.) He reasoned:

11 For example, while the claimant was noted to be depressed with "minimal  
12 frustration tolerance", Dr. Havellana observed that the claimant was "adequately  
13 friendly and polite". Moreover, Dr. Havellana reported that "despite the above  
14 mentioned difficulties", the claimant "presented with numerous strengths that will  
15 likely assist her in a vocational setting". For instance, Dr. Havellana indicated  
16 that the claimant was adequately groomed, compliant with medication  
17 recommendations, and able to complete activities of daily living independently.  
18 The claimant's performance on the mental status exam also strongly indicates a  
19 greater cognitive capacity than implicated by these check-the-box findings. For  
20 example, the claimant was able to follow more complex, 3-step commands.

21 (AR 28, internal citations to record and footnote omitted.) The ALJ further noted that, even if  
22 the findings were consistent with the observations and testing, Dr. Havellana estimated the  
23

24 <sup>2</sup> Dr. Connolly assessed plaintiff with GAF scores of 54 and 52. (AR 224, 235.) According to an  
25 earlier version of the Diagnostic and Statistical Manual of Mental Disorders (DSM), these scores reflect  
26 moderate symptoms or moderate difficulty in social, occupational, or school functioning. DSM-IV-TR 34  
27 (4th ed. 2000). The most recent version of the DSM does not include a GAF rating for assessment of  
28 mental disorders. DSM-V at 16-17 (5th ed. 2013). While the Social Security Administration continues to  
29 receive and consider GAF scores from "acceptable medical sources" as opinion evidence, a GAF score  
30 cannot alone be used to "raise" or "lower" someone's level of function, and, unless the reasons behind the  
31 rating and the applicable time period are clearly explained, it does not provide a reliable longitudinal  
32 picture of the claimant's mental functioning for a disability analysis. Administrative Message 13066  
33 ("AM-13066").

1 severity would last a maximum of nine months, “indicating her mental condition would not  
2 continue to cause significant functional limitations.” (*Id.*)

3 The ALJ erred in failing to address the July 2010 evaluation of this examining physician.  
4 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (“The ALJ must consider all medical  
5 opinion evidence.”); 20 C.F.R. §§ 404.1457(c), 416.927(c) (“Regardless of its source, we will  
6 evaluate every medical opinion we receive.”), and *Vincent v. Heckler*, 739 F.2d 1393, 1394-95  
7 (9th Cir. 1984) (ALJ must explain why significant probative evidence has been rejected). The  
8 Commissioner argues any error was harmless because the ALJ alternatively found at step two  
9 that plaintiff’s major depressive disorder was severe, and because the evaluation did not suffice  
10 to demonstrate an impairment satisfying the twelve-month durational requirement. *See Molina*,  
11 674 F.3d at 1115 (ALJ’s error may be deemed harmless where it is ““inconsequential to the  
12 ultimate nondisability determination.””; the court looks to “the record as a whole to determine  
13 whether the error alters the outcome of the case.”), and 42 U.S.C. § 423 (d)(1)(A) (disabling  
14 impairment must have lasted or be expected to last for twelve continuous months); 20 C.F.R. §§  
15 404.1505, 1509 (same).

16 However, the impact of this evaluation on both the ALJ’s initial step two determination  
17 and the remainder of the ALJ’s decision remains unclear. For example, it is not clear whether  
18 the ALJ considered Dr. Havellana’s first evaluation as a part of the sparse record for the DIB  
19 claim. *See Lester*, 81 F.3d at 832 (“[M]edical evaluations made after the expiration of a  
20 claimant’s insured status are relevant to an evaluation of the preexpiration condition.””) (quoting  
21 *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988).) Nor did the ALJ address the question of  
22 whether Dr. Havellana’s two evaluations considered together – estimating up to seven months  
23 impairment initially and up to nine months impairment subsequently – could be said to satisfy

1 the durational requirement.

2       The Court also finds the ALJ's remaining reasons for the rejection of Dr. Havellana's  
3 second evaluation problematic. For instance, the ALJ specifically qualified his observation that  
4 plaintiff was adequately friendly and polite with the observation that she nonetheless appeared  
5 depressed and presented with diminished frustration tolerance. (AR 225.) The mere fact that Dr.  
6 Havellana found plaintiff had adequate grooming, was compliant with her medications, and was  
7 able to perform her activities of daily living independently does not sufficiently undercut his  
8 opinions that plaintiff had marked limitations in her ability to learn new tasks, perform routine  
9 tasks without undue supervision, to communicate and perform effectively in a work setting with  
10 public contact, and to maintain appropriate behavior in a work setting. (AR 225-26.) Finally,  
11 Dr. Havellana's assessment of a moderate limitation in the ability to understand, remember, and  
12 persist in tasks by following complex instructions is not necessarily inconsistent with the fact  
13 that plaintiff was able to complete a three-step task, particularly when considered in relation to  
14 the fact that she could only recall one out of three items after a five-minute delay and was only  
15 able to complete a serial-sevens task slowly. (AR 225, 227.)

16       In sum, the ALJ's consideration of Dr. Havellana's opinions lacks the support of  
17 substantial evidence. The ALJ should consider both of Dr. Havellana's evaluations on remand.

18 C. Dr. Jennifer Palermo

19       Dr. Jennifer Palermo examined plaintiff on July 12, 2011. (AR 303-06.) She assessed a  
20 GAF of 48 (AR 306), reflecting serious symptoms or any serious impairment in social,  
21 occupational, or school functioning. DSM-IV-TR at 34. *See supra* n.2. She described plaintiff's  
22 prognosis as fair and opined the following functional assessment:

23       The claimant appears to have clear ability to reason and understand. Remote,

1 recent, and immediate memories are all generally intact. Sustained concentration  
2 and persistence appear somewhat challenging for this individual, though she does  
3 describe being generally able to follow the plot of television shows. She is  
choosing to socially isolate herself at this point in time and appears to have some  
adaptation skills.

4 (AR 306.)

5 The ALJ gave the GAF score no weight, pointing to Dr. Palermo's opinion of plaintiff's  
6 clear ability to reason and understand. (AR 27.) He further noted that Dr. Palermo did not opine  
7 as to a significant cognitive or social limitation, stating only that plaintiff's sustained  
8 concentration and persistence appeared somewhat challenging, that she was choosing to socially  
9 isolate, and did appear to have some adaptation skills. (*Id.*)

10 Plaintiff does not demonstrate error in the ALJ's reasoning. Where a physician's report  
11 does not assign any specific limitations or opinions in relation to an ability to work, the ALJ need  
12 not provide clear and convincing or specific and legitimate reasons to reject the report. *Turner v.*  
13 *Comm'r of Social Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010). Dr. Palermo's observation  
14 that concentration and persistence appeared "somewhat challenging" does not reflect a specific  
15 assignment of limitation, particularly considering the fact that he followed up this observation  
16 with an example of plaintiff's admitted ability to concentrate and persist. Also, there is no  
17 necessary discrepancy between Dr. Palermo's finding on examination that plaintiff followed a  
18 three-step command "with no difficulty[.]" and the ALJ's RFC finding that plaintiff could  
19 perform some complex tasks, up to four-to-five steps. (AR 24 and 305.) Further, "there is no  
20 requirement in the regulations for a direct correspondence between an RFC finding and a specific  
21 medical opinion on the functional capacity in question." *Chapo v. Astrue*, 682 F.3d 1285, 1288  
22 (10th Cir. 2012). Indeed, the "final responsibility for decision issues such as" an individual's  
23 RFC "is reserved to the Commissioner." SSR 96-5P. Finally, the ALJ reasonably pointed to Dr.

1 Palermo's opinion that plaintiff had a clear ability to reason and understand as a basis for  
 2 rejecting the GAF score assessed. *See also supra* n.2. The ALJ, as such, need not reconsider the  
 3 opinions of Dr. Palermo on remand.

4 D. Lam L. Yoo, ARNP

5 Nurse practitioner Lam Yoo drafted a letter, dated September 12, 2012, describing  
 6 plaintiff's treatment since August 30, 2010 and the continued efforts "to find the right regimen of  
 7 medication and psychotherapy as her mental health continues to be disabling and is significantly  
 8 compromising her quality of life." (AR 341.) The ALJ gave this opinion no weight "as  
 9 treatment records largely only showed medication management with subjective complaints of  
 10 which there are credibility concerns[.]" (AR 28 (citing AR 311-37, 342).)

11 Plaintiff rejects the ALJ's analysis, stating the treatment notes indicated plaintiff  
 12 "struggled with motivation, isolation, negativity, and forgetfulness and had her medications  
 13 adjusted several times because they were not working optimally." (Dkt. 13 at 13 (citing AR 342-  
 14 47).) However, a review of the treatment records provides support for the ALJ's interpretation.  
 15 (See AR 311-37, 342-47.) While plaintiff takes a different view of the record, she fails to  
 16 demonstrate the ALJ's interpretation was not rational. *Morgan*, 169 F.3d at 599. The ALJ, as  
 17 such, properly provided germane reasons for the rejection of Yoo's opinion.

18 Credibility

19 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
 20 reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)  
 21 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). *See also Vertigan v. Halter*,  
 22 260 F.3d 1044, 1049 (9th Cir. 2001). "General findings are insufficient; rather, the ALJ must  
 23 identify what testimony is not credible and what evidence undermines the claimant's

1 complaints.” *Lester*, 81 F.3d at 834. “In weighing a claimant’s credibility, the ALJ may  
2 consider his reputation for truthfulness, inconsistencies either in his testimony or between his  
3 testimony and his conduct, his daily activities, his work record, and testimony from physicians  
4 and third parties concerning the nature, severity, and effect of the symptoms of which he  
5 complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

6 The ALJ in this case found plaintiff’s testimony concerning the intensity, persistence, and  
7 limiting effects of her symptoms not fully credible, and provided a number of clear and  
8 convincing reasons in support. (AR 25-27.) The ALJ reasonably considered: (1) medical  
9 evidence contradicting and/or failing to support the degree of limitation alleged, *Carmickle*, 533  
10 F.3d at 1161 (“Contradiction with the medical record is a sufficient basis for rejecting the  
11 claimant’s subjective testimony.”) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)  
12 (considering fact that medical evidence did not support the degree of functional limitation  
13 claimed)); (2) evidence that noncompliance with treatment, including multiple instances of  
14 missed medication doses, and situational factors, such as plaintiff’s finances and issues with her  
15 daughter, likely contributed to periodic complaints of increased symptoms, *see Tommasetti*, 533  
16 F.3d at 1039 (ALJ appropriately considers unexplained or inadequately explained failure to  
17 follow a prescribed course of treatment), and *Sample*, 694 F.2d at 642 (ALJ may draw inferences  
18 logically flowing from evidence); (3) evidence that plaintiff’s range of activities (including days  
19 spent walking her dog, taking care of paperwork, running errands, and cleaning the house, her  
20 ability to complete daily activities independently, and her reports she did her own cooking and  
21 grocery shopping, and “kept busy helping neighbors and crocheting for charity work”) indicated  
22 greater cognitive and social capacity than alleged, *Molina*, 674 F.3d at 1112-13, and *Orn v.*  
23 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); and (4) the fact that plaintiff stopped working in

1 March 2008 due to a lack of work, not because of her impairment, and the inconsistency between  
 2 her testimony she spent more than two years after she was let go looking for another job and her  
 3 contention she has been unable to work since March 2008, *see Bruton v. Massanari*, 268 F.3d  
 4 824, 828 (9th Cir. 2001) (ALJ properly considered evidence plaintiff reported he left his job as a  
 5 result of a lay off, rather than a work place injury), *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1221,  
 6 1227 (9th Cir. 2009) (ALJ properly considered evidence of claimant's attempts to seek  
 7 employment), and *Light*, 119 F.3d at 792 (ALJ properly considers inconsistencies).

8 Plaintiff challenges all of the ALJ's reasons for not finding her fully credible, but fails to  
 9 demonstrate the ALJ's interpretation of the evidence was not rational or otherwise demonstrate  
 10 error in the ALJ's credibility conclusion.<sup>3</sup> Accordingly, the ALJ need only reconsider plaintiff's  
 11 credibility as necessitated by further consideration of the medical opinion evidence from Drs.  
 12 Connolly and Havellana.

13 Lay Testimony

14 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability  
 15 to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v.*  
 16 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses  
 17 only upon giving germane reasons. *Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996)

18 <sup>3</sup> For example, in relation to the ALJ's reliance on evidence of plaintiff repeatedly missing  
 19 medication doses, plaintiff asserts error in the ALJ's failure to consider evidence of her difficulties  
 20 affording appropriate care or transportation, and problems with her medical insurance and unpleasant side  
 21 effects. *See* SSR 82-59 (failure to follow prescribed treatment may be justifiable where claimant unable  
 22 to afford); SSR 96-7p (ALJ should not draw inferences from failure to seek or pursue treatment without  
 23 first considering explanations for that failure, including an inability to afford treatment). However, as the  
 Commissioner observes, the records cited by plaintiff in support of this argument do not show that  
 plaintiff missed medication doses for any of those reasons. (*See* AR 262 (plaintiff wanted, but could not  
 afford counseling), AR 277 (difficulty finding a dentist to help with abscess due to lack of insurance), AR  
 281 (plaintiff had to check on transportation before making appointment); *cf.* AR 316 (plaintiff was taking  
 smaller dose of medication after a friend mentioned "she was sleeping very 'heavy'", but she felt better at  
 higher dose).)

1 (finding rejection of testimony of family members because, *inter alia*, they were  
2 “understandably advocates, and biased”” amounted to “wholesale dismissal of the testimony of  
3 all the witnesses as a group and therefore [did] not qualify as a reason germane to each  
4 individual who testified.”) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).

5 The ALJ here described lay evidence provided by plaintiff’s friend, Faith Mitchell, and  
6 found it consistent with plaintiff’s self-report. (AR 28, 195-202.) Mitchell’s observations  
7 included, for example, that plaintiff was unable to get dressed, “cries all day every day[,]” and  
8 was unable to handle stress. (*Id.*) The ALJ accorded the statement no weight as it was  
9 inconsistent with plaintiff’s admission that she kept busy helping neighbors and crocheting for  
10 charity work, and her admitted daily activities. (AR 29 (citing AR 361 (“[R]eports she keeps  
11 busy helping neighbors, crocheting for charity work and ‘activity good right now – no pressure’,  
12 states at times she is ‘on edge.’”))

13 Plaintiff avers inconsistency between the ALJ’s finding that Mitchell’s statement was  
14 consistent with plaintiff’s testimony, and the ALJ’s finding that Mitchell’s statement was  
15 inconsistent with plaintiff’s admissions as to her activities. However, there is no inconsistency in  
16 the ALJ’s findings. That is, the ALJ acknowledged that Mitchell and plaintiff attested to a  
17 similar degree of limitation, but reasonably concluded their assertions as to plaintiff’s limitations  
18 were inconsistent with evidence in the record as to plaintiff’s admitted activities. Also, while  
19 plaintiff maintains the ALJ had insufficient information regarding how often or for how long she  
20 crocheted or helped her neighbors, the ALJ can properly rely on this evidence and evidence of  
21 plaintiff’s other activities as germane reasons for rejecting Mitchell’s report. *See Carmickle*, 533  
22 F.3d at 1164 (ALJ may discredit lay testimony based on inconsistency between lay statement and  
23 evidence of claimant’s activities), and *Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2001)

1 (germane reasons for discounting lay testimony included inconsistency with medical evidence,  
2 evidence of claimant's activities, and claimant's reports).

3 Steps Four and Five

4 Plaintiff argues the ALJ's RFC finding failed to encompass all of her limitations, pointing  
5 to the alleged errors in the consideration of medical opinions and asserting an absence of  
6 sufficient support for the limitations assessed in relation to concentration, persistence, or pace,  
7 and the failure to include any social limitations. Because these arguments in large part restate  
8 the arguments addressed above, plaintiff fails to demonstrate error. *See Stubbs- Danielson v.*  
9 *Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008). Nor does plaintiff otherwise demonstrate error  
10 in the ALJ's consideration of evidence in the formulation of the RFC. However, the ALJ should  
11 reconsider plaintiff's RFC as necessitated by further consideration of the evidence from Drs.  
12 Connolly and Havellana.

13 Plaintiff also argues step four error given the failure to identify the mental requirements  
14 for the position of game auditor, the failure to cite to the relevant job description in the  
15 Dictionary of Occupational Titles (DOT), and the failure to perform the functional analysis  
16 required by SSR 82-62 by identifying the requirements of the job and comparing those  
17 requirements to plaintiff's abilities. Again, however, the ALJ did not err. The ALJ did describe  
18 the physical and mental demands of plaintiff's past relevant work as a game auditor. (AR 29  
19 ("The claimant described job tasks as moving boxes of pull-tab games using a hand truck,  
20 counting samples and winners, using a scale, and checking paperwork.") (citing AR 150, 41-  
21 42).) He further properly relied on plaintiff's work history report and her own testimony as to  
22 how the work was performed. *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001).  
23 Comparing plaintiff's RFC with the mental demands of the work, the ALJ concluded plaintiff

1 could perform the job of game auditor as she actually performed the job. (AR 29.) Having  
2 found as such, the ALJ was not required to render additional findings as to how the job is  
3 generally performed, or to consult a source such as the DOT in making such a determination.  
4 *Pinto*, 249 F.3d at 844-46.

5 The ALJ also found plaintiff would not be found disabled as considered within the  
6 framework of the Medical-Vocational Guidelines, or “grids,” as interpreted by SSR 85-15,  
7 because, even if limited to work involving simple, repetitive tasks, the universe of unskilled  
8 work would not be significantly eroded. (AR 29.) Reiterating the contention the ALJ failed to  
9 address significant nonexertional limitations in the RFC, plaintiff avers error because such  
10 limitations erode the occupational base for unskilled work, preclude application of the grids, and  
11 necessitate vocational expert testimony. *See* SSR 83-12, 83-14, 85-15. However, again, plaintiff  
12 fails to demonstrate error in the RFC assessment. The ALJ, as such, did not err in his step five  
13 conclusion. SSR 85-15 (“The basic mental demands of competitive, remunerative, unskilled  
14 work include the abilities (on a sustained basis) to understand, carry out, and remember simple  
15 instructions; to respond appropriately to supervision, coworkers, and usual work situations; and  
16 to deal with changes in a routine work setting.”) The ALJ, therefore, need only revisit this step,  
17 and the conclusion at step four, as required by any further consideration of the medical evidence.

18 CONCLUSION

19 This matter should be REMANDED for further administrative proceedings.

20 DEADLINE FOR OBJECTIONS

21 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
22 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and  
23 Recommendation is signed. Failure to file objections within the specified time may affect your

1 right to appeal. Objections should be noted for consideration on the District Judge's motions  
2 calendar for the third Friday after they are filed. Responses to objections may be filed within  
3 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will  
4 be ready for consideration by the District Judge on December 5, 2014.

5 DATED this 20th day of November, 2014.

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Mary Alice Theiler  
Chief United States Magistrate Judge